No. 9568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 18

GUISEPPE MAITA,

Appellant,

vs.

EDW. L. HAFF, District Director of Immigration and Naturalization for the District of San Francisco, California,

Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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May it please the Court:

This is an appeal from an order of the District Court of the Northern District of California, Southern Division, denying application for a writ of habeas corpus.

JURISDICTIONAL STATEMENT.

The statute involved is the Act of February 5, 1917, c. 29 §19, 39 Stat. 889, 8 U.S.C. §155, the pertinent portion of which reads as follows:

> "* * * any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a

> crime involving moral turpitude committed within five years after entry of the alien into the United States * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The jurisdiction of the District Court is that familiarly exercised upon a petition for a writ of habeas corpus (T. 1-6) by an alien detained under a warrant of deportation issued by the Secretary of Labor (R.S. §451).

The jurisdiction of this Court is based upon the Act of February 13, 1925, c. 229 §6, 43 Stat. 940; 28 U.S.C. §463.

STATEMENT OF THE CASE.*

November 24, 1936 appellant, a resident of San Francisco, California, was sentenced by the Court below to a term of eighteen months in the Federal Penitentiary at McNeil Island on his plea of guilty to a charge of engaging in the business of a distiller of alcohol, with intent to defraud the United States of the tax on the spirits distilled (R. 1, 5). While appellant was serving that sentence and while he was incarcerated in the penitentiary, an immigration inspector questioned him on January 13, 1937 and again on March 17, 1937 (R. 7, 15). Among other things, the record shows that appellant stated that he came to the United States from Italy in April, 1906 (R. 12) and further testified as follows:

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*T. refers to printed Transcript of Record and R. refers to Immigration Record which is Respondent's Exhibits, original transmitted here.

"Q. Did you ever visit in Mexico?

A. One time I went to Tiajuana to see what it was like, that was about four years ago.

Q. You went just to Tiajuana?

A. Yes.

Q. Did the immigration officers talk to you when you came back?

A. They stopped me and that is all.

Q. How were you traveling, by stage or auto?

A. By auto, in my son's car.

Q. That was four years ago?

A. I think so, it was three or four months before the country went wet. It was in the summer."

September 15, 1937 a warrant for appellant's arrest was applied for on the basis of the judgment of conviction and sentence and the statements of appellant quoted above (R. 16). October 19, 1937 the warrant of arrest issued, directing officers of the immigration service at Seattle to grant appellant a hearing (R. 17). October 27, 1937 an attorney at Washington, D. C., requested the Department of Labor there to notify him when the record of the hearing was received so that he might appear before the Board of Review at Washington in connection with the case (R. 18).

November 3, 1937 the hearing was held in the penitentiary at McNeil Island. Appellant was present without counsel. The record shows that he was informed of the purpose of the hearing, the warrant of arrest was read to him, he was advised of his right to counsel, he was asked whether he desired to be so represented and he replied that he did not, he was

asked whether he was ready to proceed and replied that he was (R. 39), the warrant of arrest was again read to him and he was asked what he had to say concerning the charge. The record shows he replied that he had a wife and five children in this country, that he had not been able to become a citizen of the United States because of the inability to read and write, that the charge contained in the warrant of arrest was true, that he knew what the evidence was but had nothing to say concerning it, that all the statements he had made to the inspector on January 13 and March 17 were true, and that he had no witnesses that he wished to testify in his behalf (R. 38). The record shows he was then asked if he had any further statement to make or any evidence to present before the hearing was closed, or anything which he wished to offer as a reason why he should not be deported, and he answered that he did not want to leave his wife and children and that he had no one in the old country (R. 38).

January 25 and February 2, 1938 appellant's Washington counsel appeared before the Board of Review at Washington, and subsequent thereto the warrant of deportation issued (R. 46), but at the request of appellant's counsel a stay was granted to afford an opportunity to apply for a pardon (R. 44). Application for a pardon was made and denied (R. 84). Thereupon, appellant's Washington counsel presented to the Secretary of Labor a petition for further stay of deportation on the ground of hardship (R. 80, 77) which was denied (R. 83).

Thereupon appellant's present counsel requested the Secretary of Labor to reopen the case, which request was denied (R. 88-91). Whereupon counsel supplemented the request for reopening by affidavits of applicant and also one Nuccio, alleging that appellant's trip to Mexico had occurred in April or May, 1929, and not in 1933 as appellant had stated on his preliminary examinations (R. 123, 130), which request was again denied (R. 137, 138).

February 6, 1939 appellant petitioned the Court below for a writ of habeas corpus, and on the same date an order to show cause issued.

April 22, 1939 the Court below made an order granting the application for the writ unless the immigration authorities would reopen the case and grant a further hearing (T. 17). The Secretary complied with the condition of the order and the case was reopened for further hearing.

At the further hearing four witnesses were called and examined: appellant, Isidoro Costanzo, Michael Nuccio and Maria Maita. Appellant testified in substance as follows (R. 166-164): he made but one trip to Tia Juana, Mexico, and that in the Spring of 1929, he went there in his own Dodge automobile which he had purchased in 1928, on the trip with him were Michael Nuccio and a man named Roberts whose present whereabouts he did not know, they stayed in Tia Juana about two hours around noon, while there the only person appellant saw whom he knew was Isidoro Costanzo, when examined by the immigration authorities appellant stated that he had made his trip

to Tia Juana three or four *years* and not three or four *months* before Repeal. Isidoro Costanzo testified in substance as follows (R. 167-168): he had known appellant fifteen or sixteen years was not related to him in any way and had never had any business dealings with him, he was in Tia Juana in the Spring of 1929 and while there saw appellant around noon in the Foreign Club. Maria Maita testified in substance as follows (R. 169-174): she is the wife of appellant and has five children, they reside in San Francisco and own their own home, appellant has owned two automobiles—first an old Overland purchased about 1922 and sold about 1927 and a Dodge purchased about 1928 and sold about 1930, appellant never owned an automobile after that, two of their sons owned automobiles and one of the sons went to Mexico with a young fellow in 1936 but appellant never went to Mexico with his son in an automobile, appellant went to Mexico with Nuccio and another man in 1929, the time is fixed as 1929 by reason of the fact that the trip to Mexico occurred about six months after the marriage of their daughter who was married in November, 1928. Michael Nuccio testified in substance as follows (R. 175-178): He is by occupation a bartender, he is a first cousin of appellant on his father's side and has known appellant approximately all of his life, he took a trip to Mexico in April or May of 1929 with appellant and a man named Roberts, the trip was made in appellant's Dodge automobile, the time when the trip was taken is fixed by reason of the fact that he had just finished junior high school in December, 1928 and was attending part-time school.

At this hearing appellant was examined through an interpreter. At his preliminary examinations in the penitentiary and the hearing held there, however, he was not examined through an interpreter but in the English language. The record shows that appellant does not read or write either the English or Italian language and that he has never had any schooling either American or Italian beyond three or four days when he first came to this country from Italy. Appellant's testimony also shows that although he has been in this country since 1906 his dealings have been mostly with Italian people and his speech is always in the Italian language. In all of the immigration proceedings excepting the last hearing he testified in the English language (R. 161-160).

April 22, 1940, a supplemental return to the order to show cause was filed incorporating the record of the final hearing, substance of which is outlined above, together with the decisions of the Department again finding appellant subject to deportation.

May 9, 1940, the District Court made its order denying the petition for writ of habeas corpus and remanding appellant to the custody of the immigration authorities for deportation (T. 16-18). From this order the present appeal is taken (T. 18).

STATEMENT OF POINTS.

Appellant was not accorded a fair hearing by the Secretary of Labor and the order for deportation is not supported by evidence.

ARGUMENT.

The vital issue is whether appellant left the United States and reentered in 1929 or 1933. If he left and reentered in 1929 this was more than five years before his conviction in 1936 and he is hence not deportable under the statute. The determination of the Secretary of Labor rests entirely upon the purported admissions made by appellant at the penitentiary.

The course of administrative hearing was not fair because of a combination of circumstances. It may be granted that most of these circumstances, taken singly, have been held not sufficient to invalidate an order of deportation. Thus in some circumstances an order of deportation may be rested upon an alien's admission.

Ikeda v. Carr, 9 Cir., 68 Fed. (2d) 276;

Keitaro v. Burnett, 9 Cir., 68 Fed. (2d) 278.

Likewise want of counsel is not a determinative circumstance.

Bilokumsky v. Tod, 263 U.S. 149, 155-156;

Medich v. Burmaster, 8 Cir., 24 Fed. (2d) 57, 59.

And the fact that the hearings were held in a penitentiary is not alone sufficient to demonstrate unfairness.

Ciccerelli v. Curran, 2 Cir., 12 Fed. (2d) 394.

And claims of misunderstanding have been held insufficient in proper circumstances to shake the Secretary's reliance upon an alien's admission.

Leffer v. Nagle, 9 Cir., 22 Fed. (2d) 800;

Cahan v. Carr, 9 Cir., 47 Fed. (2d) 604;

Re Fukumoto, 9 Cir., 53 Fed. (2d) 618;

Greco v. Haff, 9 Cir., 63 Fed. (2d) 863;
Ung Bak Foon v. Prentis, 7 Cir., 227 Fed. 406.

Let it be observed however that all of these cases contained a factor or several factors which saved the departmental hearings against a charge of unfairness. Thus, *Leffer, Greco, Fukumoto* and *Ung Bak Foon* were represented by counsel; and *Ikeda* and *Fukumoto* were granted numerous administrative continuances and hearings; and the admissions of *Cahan, Leffer,* and *Fukumoto* were corroborated by independent evidence. In other words in these cases at least one of the following factors—or generally a combination of them —appeared: representation by counsel; a real opportunity—afforded by the department—to marshal evidence and to produce witnesses; and a disposition to take and hear evidence independent of the alien's admission.

At bar we have an ignorant and illiterate Italian incarcerated in a penitentiary many miles from his home and his friends. His ability to understand and to make himself understood is imperfect. He is examined while incarcerated and without counsel; and upon the basis of a purported admission there wrung from him concerning the exact time of an event which had occurred many years before he is ordered deported. Upon this admission alone, so secured, the Secretary was not only content but actively insistent upon standing as a basis for deportation. There was not only no disposition on the part of the Secretary to test the admission by independent evidence, there was active opposition from the Secretary to such a

course. Appellant's proffer of independent evidence was met with closed eyes and a denial to reopen; and when independent evidence was taken, it was heard only under the compulsion of an order of the District Court.

The course of administrative procedure and the result reached in this case stand in unfavorable comparison with the case of

Nagle v. Eizaguirre, 9 Cir., 41 Fed. (2d) 735,

where a like admission was exacted from a flustered alien upon his arrest in a house of prostitution. In that case, unlike the case at bar, the Secretary granted the alien further hearings notwithstanding his original unfavorable admission which rendered him subject to deportation; and since independent evidence adduced at the subsequent administrative hearings showed the unreliability of the alien's original admission the writ of habeas corpus issued notwithstanding the original admission, because the full hearing which due process requires brought out the true facts and so made reliance upon the alien's original admission arbitrary and capricious. The circumstances in which appellant at bar is alleged to have made the admission upon which the Secretary now stands we submit raise more doubts of its reliability than the circumstances in which Eizaguirre made his original admission. Furthermore, at bar appellant's alleged admission stands utterly uncorroborated whereas Eizaguirre's original admission was corroborated by the testimony of another witness; and notwithstanding this fact this Court held that the Secretary was unjustified in relying

either upon Eizaguirre's original admission or upon the evidence corroborating it in view of the true facts elicited at the subsequent administrative hearings.

It is submitted that appellant did not have a fair hearing and that the order of deportation is not sufficiently supported by evidence. The order should be reversed.

Dated, San Francisco,
August 23, 1940.

Respectfully submitted,
CHAUNCEY TRAMUTOLO,
Attorney for Appellant.